BEFORE THE
BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: **NICHOLAS EDWARD FISICHELLA,** Pharmacy Technician Registration No. TCH 64354, Respondent.	Case No. 3054 OAH Case No. L2007070127

DECISION

The Board of Pharmacy hereby adopts the attached Proposed Decision, dated February 19, 2008, as its decision in the above-entitled matter except that, pursuant to the provisions of Government Code sections 11517(c)(2)(B) and 11517(c)(2)(C), the proposed penalty is reduced and the following technical changes are made to the Decision:

(1) On page 7, the second sentence of the last paragraph is amended to strike the word "five" and replace it with the word "three" to reflect a reduction in the penalty, so that the sentence states:

"The imposition of a revocation, stayed, with three years probation on appropriate terms and conditions of probation will adequately protect the public."

(2) On page 13, the last sentence of paragraph 21 is amended to strike the word "five" and replace it with the word "three" to reflect a reduction in the penalty, so that the sentence states:

"The imposition of a revocation, stayed, with three years probation on appropriate terms and conditions of probation will adequately protect the public."

(3) On page 14, paragraph one of the Order, the probationary term is reduced from five (5) to three (3) years so that the Order is modified to state:

"Pharmacy technician registration number TCH 64354 issued to respondent Nicholas Edward Fisichella is revoked; however, the order of revocation is stayed and respondent is placed on probation for three (3) years upon the following terms and conditions:...";

(4) On page 16, paragraph 12 of the Order, which contains the title, term and condition for "**Random Drug Screening,**" is deleted in its entirety;

(5) On page 16, a new paragraph 12 is added to the Order to include a Standard Term and Condition of Probation, which is titled "**Violation of Probation**", and states:

"If respondent violates probation in any respect, the Board, after giving respondent notice and an opportunity to be heard, may revoke probation and carry out the disciplinary order of revocation, which was stayed. If a petition to revoke probation or an accusation is filed against respondent during probation, the Board shall have continuing jurisdiction, and the period of probation shall be extended, until the petition to revoke probation or accusation is heard and decided.

If respondent has not complied with any term or condition of probation, the Board shall have continuing jurisdiction over respondent, and probation shall automatically be extended until all terms and conditions have been satisfied or the Board has taken other action as deemed appropriate to treat the failure to comply as a violation of probation, to terminate probation, and to impose the penalty of revocation, which was stayed."

(6) On Page 17, paragraph 16 of the Order, the word "suspension" is struck from both the paragraph and the term titled "**Tolling of Suspension**" and replaced with the word "probation" so that the title becomes "**Tolling of Probation**" and the condition at paragraph 16 states:

"If respondent leaves California to reside or practice outside this state, or for any period exceeding 10 days (including vacation), respondent must notify the Board in writing of the dates of departure and return. Periods of residency or practice outside the state or any absence exceeding a period of 10 days shall not apply to the reduction of the probationary period. Respondent shall not act as a pharmacy technician upon returning to this state until notified by the Board that the period of probation has been completed."

(7) On Page 18, a new paragraph 18 is added to the Order, so that a Standard Term and Condition for Probation for surrenders is added, which states:

"*License Surrender While on Probation*

Following the effective date of this decision, should respondent cease practice due to retirement or health, or be otherwise unable to satisfy the terms and conditions of probation, respondent may tender his license to the Board for surrender. The Board shall have the discretion whether to grant the request for surrender or take any other action it deems appropriate and reasonable. Upon formal acceptance of the surrender of the license, respondent will no longer be subject to the terms and conditions of probation.

Upon acceptance of the surrender, respondent shall relinquish his pocket license to the Board within 10 days of notification by the Board that the surrender is accepted. Respondent may not reapply for any license from the Board for three years from the effective date of the surrender. Respondent shall meet all requirements applicable to the license sought as of the date the application for that license is submitted to the Board."

Based upon the foregoing amendments to the Order, the Board's Order, in its entirety, now reads as follows:

ORDER

Pharmacy technician registration number TCH 64354 issued to respondent Nicholas Edward Fisichella is revoked; however, the order of revocation is stayed and respondent is placed on probation for three (3) years upon the following terms and conditions:

1. *Obey All Laws*

Respondent shall obey all state and federal laws and regulations substantially related to or governing the practice of pharmacy.

2. *Certification Prior to Resuming Work*

Respondent shall be suspended from working as a pharmacy technician until he is certified by the Pharmacy Technician Certification Board (PTCB) and provides satisfactory proof of certification to the Board.

During suspension, respondent shall not enter any pharmacy area or any portion of the licensed premises of a wholesaler, veterinary food-animal drug retailer or any other distributor of drugs which is licensed by the Board, or any manufacturer, or where dangerous drugs and devices or controlled substances are maintained. Respondent shall not do any act involving drug selection, selection of stock, manufacturing, compounding or dispensing; nor shall respondent manage, administer, or be a consultant to any licensee of the Board, or have access to or control the ordering, manufacturing or dispensing of dangerous drugs and devices or controlled substances.

Subject to the above restrictions, respondent may continue his employment with MedImpact so long as he does not have any direct contact with any controlled substance.

3. *Reporting to the Board*

Respondent shall report to the Board quarterly. The report shall be made either in person or in writing, as directed. Respondent shall state under penalty of perjury whether there has been compliance with all the terms and conditions of probation. If the final probation report is not made as directed, probation shall be extended automatically until such time as the final report is made and accepted by the Board.

4. *Interview with the Board*

Upon receipt of reasonable notice, respondent shall appear in person for interviews with the Board upon request at various intervals at a location to be determined by the Board. Failure to appear for a scheduled interview without prior notification to Board staff shall be considered a violation of probation.

5. *Cooperation with Board Staff*

Respondent shall cooperate with the Board's inspectional program and in the Board's monitoring and investigation of respondent's compliance with the terms and conditions of his probation. Failure to comply shall be considered a violation of probation.

6. *Notice to Employers*

Respondent shall notify all present and prospective employers of the decision in this case (Case No. 3054) and the terms, conditions and restrictions imposed on respondent by the decision. Within 30 days of the effective date of this decision, and before respondent

undertakes any new employment, respondent shall cause his employer to report to the Board in writing acknowledging the employer has read the decision in Case No. 3054.

7. *Limitation on Employment*

Respondent shall not commence any new employment in any pharmacy or any portion of the licensed premises of a wholesaler, veterinary food-animal drug retailer, or any other distributor of drugs that is licensed by the Board, or in any structure where dangerous drugs and devices or controlled substances are maintained, nor shall respondent have any new employment involving drug selection, selection of stock, manufacturing, compounding or dispensing, nor shall respondent manage, administer, or be a consultant to any licensee of the Board, nor shall respondent have access to or control the ordering, manufacturing or dispensing of dangerous drugs and devices or controlled substances without first seeking Board approval.

"Employment" within the meaning of this provision and provision six shall include any full-time, part-time, temporary or relief service or pharmacy management service as a pharmacy technician, whether the respondent is considered an employee or independent contractor.

8. *Reimbursement of Board Costs*

Respondent shall pay to the Board its costs of investigation and prosecution in the amount of $2,500.00. Respondent shall make said payments at the rate of $250 or more each month until this obligation is satisfied.

If respondent fails to pay the costs as specified by the Board, the Board shall, without affording the respondent notice and the opportunity to be heard, revoke probation and carry out the disciplinary order that was stayed. The filing of bankruptcy by respondent shall not relieve respondent of his responsibility to reimburse the Board its costs.

9. *Probation Monitoring Costs*

Respondent shall pay the costs associated with probation monitoring as determined by the Board each and every year of probation. Such costs shall be payable to the Board at the end of each year of probation. Failure to pay such costs shall be considered a violation of probation.

10. *Status of License*

Respondent shall, at all times while on probation, maintain an active current technician registration/certification with the Board, including any period during which suspension or probation is tolled.

If respondent's technician registration/certification expires or is cancelled by operation of law or otherwise, upon renewal or reapplication, respondent's license shall be subject to all terms and conditions of this probation not previously satisfied.

11. *Notification of Employment/Mailing Address Change*

Respondent shall notify the Board in writing within 10 days of any change of employment. Said notification shall include the reasons for leaving and/or the address of the new employer,

supervisor or owner and work schedule, if known. Respondent shall notify the Board in writing within 10 days of a change in name, mailing address or phone number.

12. *Violation of Probation*

If respondent violates probation in any respect, the Board, after giving respondent notice and an opportunity to be heard, may revoke probation and carry out the disciplinary order of revocation, which was stayed. If a petition to revoke probation or an accusation is filed against respondent during probation, the Board shall have continuing jurisdiction, and the period of probation shall be extended, until the petition to revoke probation or accusation is heard and decided.

If respondent has not complied with any term or condition of probation, the Board shall have continuing jurisdiction over respondent, and probation shall automatically be extended until all terms and conditions have been satisfied or the Board has taken other action as deemed appropriate to treat the failure to comply as a violation of probation, to terminate probation, and to impose the penalty of revocation, which was stayed.

13. *Work Site Monitor*

Within 10 days of the effective date of this decision, respondent shall identify a work site monitor, for prior approval by the Board, who shall be responsible for supervising respondent during working hours. The work site monitor shall report to the Board quarterly. Should the designated work site monitor determine at any time during the probationary period that respondent has not maintained sobriety, he or she shall notify the Board immediately, either orally or in writing as directed. Should respondent change employment, a new work site monitor must be designated, for prior approval by the Board, within 10 days of commencing new employment.

14. *Notification of Departure*

If respondent leaves the geographic area for a period greater than 24 hours, respondent shall notify the Board verbally and in writing of the dates of departure and return, prior to leaving.

15. *Abstain from Drugs and Alcohol Use*

Respondent shall completely abstain from the possession or use of alcohol, controlled substances, dangerous drugs and their associated paraphernalia except when the drugs are lawfully prescribed by a licensed practitioner as part of a documented medical treatment. Upon request of the Board, respondent shall provide documentation from the licensed practitioner that the prescription was legitimately issued and is a necessary part of the treatment of the respondent. Respondent shall ensure that he is not in the presence of or in the same physical location as individuals who are using illicit substances even if respondent is not personally ingesting the drugs. Additionally, respondent shall cause the prescribing practitioner to notify the Board in writing, indicating their awareness of the chemical dependency. Additionally, respondent shall cause the prescribing physician to notify the Board in writing, indicating their awareness of the chemical dependency.

16. *Tolling of Probation*

If respondent leaves California to reside or practice outside this state, or for any period

exceeding 10 days (including vacation), respondent must notify the Board in writing of the dates of departure and return. Periods of residency or practice outside the state or any absence exceeding a period of 10 days shall not apply to the reduction of the probationary period. Respondent shall not act as a pharmacy technician upon returning to this state until notified by the Board that the period of probation has been completed.

17. *Successful Completion of Probation*

Upon the successful completion or early termination of probation, respondent's registration shall be fully restored.

18. *License Surrender While on Probation*

Following the effective date of this decision, should respondent cease practice due to retirement or health, or be otherwise unable to satisfy the terms and conditions of probation, respondent may tender his license to the Board for surrender. The Board shall have the discretion whether to grant the request for surrender or take any other action it deems appropriate and reasonable. Upon formal acceptance of the surrender of the license, respondent will no longer be subject to the terms and conditions of probation.

Upon acceptance of the surrender, respondent shall relinquish his pocket license to the Board within 10 days of notification by the Board that the surrender is accepted. Respondent may not reapply for any license from the Board for three years from the effective date of the surrender. Respondent shall meet all requirements applicable to the license sought as of the date the application for that license is submitted to the Board.

This Decision shall become effective on June 18, 2008.

IT IS SO ORDERED this 19th day of May, 2008.

WILLIAM POWERS
President, Board of Pharmacy
Department of Consumer Affairs

BEFORE THE
BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:	Case No. 3054
NICHOLAS EDWARD FISICHELLA,	OAH No. L2007070127
Pharmacy Technician Registration No. TCH 64354	
Respondent.	

PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on January 18, 2008, in San Diego, California.

Ben Johnson, Deputy Attorney General, represented complainant Virginia Herold, the Executive Officer of the Board of Pharmacy, Department of Consumer Affairs, State of California.

Respondent Nicholas Edward Fisichella represented himself and was present throughout the administrative proceeding.

On January 18, 2008, the matter was submitted.

FACTUAL FINDINGS

Jurisdictional Matters

1. On May 4, 2007, complainant Virginia Herold, the Executive Officer of the Board of Pharmacy (the Board), Department of Consumer Affairs, State of California, signed the accusation in her official capacity. The accusation alleged that respondent Nicholas Edward Fisichella (Fisichella or respondent) was convicted of theft of a controlled substance on December 19, 2005 (first cause for discipline), possession of controlled substances by theft (second cause for discipline), and unprofessional conduct (third cause for discipline). The accusation sought to suspend or revoke Fisichella's pharmacy technician registration and sought an order directing Fisichella to pay to the Board its reasonable costs of investigation

and enforcement. The accusation and other required documents were served on Fisichella, who timely filed a notice of defense. The disciplinary matter was set for an administrative hearing.

On January 18, 2008, the record in the administrative hearing was opened. Jurisdictional documents were presented. Notice was taken of the Board's disciplinary guidelines. Sworn testimony and documentary evidence was received, closing arguments were given, the record was closed, and the matter was submitted.

Registration Information and History

2. To qualify for registration as a pharmacy technician under Business and Professions Code section 4202, an individual must establish that he or she is a high school graduate or possesses a general educational development certificate equivalent and meets one of the following conditions: (1) holds an associate's degree in pharmacy technology; or (2) has completed a course of training specified by the Board[1]; or (3) has graduated from a school of pharmacy recognized by the Board; or (4) holds certification from the Pharmacy Technician Certification Board (PTCB). In addition, an applicant must not have been convicted of any crime and must not have been involved in any misconduct substantially related to the qualifications, functions, or duties of a registered pharmacy technician. Passing a competency examination is not required to become registered as a pharmacy technician.

Pharmacy technicians are not independent practitioners, but work under the supervision of registered pharmacists.

3. On August 10, 2005, the Board issued Pharmacy Technician Registration No. TCH 64345, to Fisichella, authorizing him to be employed as a pharmacy technician in California. Fisichella's pharmacy technician's registration is renewed through February 28, 2009, unless suspended or revoked.

There is no history of any previous administrative discipline having been imposed against Fisichella's pharmacy technician's registration.

Fisichella's Background, Training, and Experience

4. Fisichella was born on July 20, 1982, in Poway, California. He grew up in Ramona and he currently lives in that community. Fisichella has an older half-brother and an older half-sister who live in the Bay Area, as well as a 27-year-old sister with Down Syndrome who lives with Fisichella's mother in Ramona. Fisichella's father, who is elderly and very ill, lives in Rancho Bernardo.

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[1] California Code of Regulations, title 16, section 1793.6 provides that a course of training that meets the requirements of Business and Professions Code section 4202(a)(2) includes (a) training program accredited by the American Society of Health-System Pharmacists; or (b) training provided by a branch of the federal armed services for which the applicant possesses a certificate of completion; or (c) any other training involving at least 240 hours of instruction in designated subject matters.

Fisichella graduated from Ramona High School in 2000. He attended California State University, San Marcos, from 2000 through 2001, and then Menlo College, a private college in the Bay Area, from 2002-2003. Fisichella is about two semesters shy of receiving a bachelor's degree.

After Fisichella's father became quite ill in 2003, Fisichella quit school and returned to San Diego County to help his family. After returning home, Fisichella became employed as a "grunt" with American Processing, an entity engaged in environmental engineering and hazardous waste removal. Fisichella decided to pursue other employment, so he enrolled at United Education Institute to obtain training to become a pharmacy technician. Fisichella attended classes for eight months, passed an examination, completed a six-week internship at Ramona Pharmacy, and received a certificate of completion in summer 2005.

After receiving his registration from the Board on August 10, 2005, Fisichella began working as a "floater" for Sav-On Drugs at pharmacies in San Diego County.

5. Fisichella does not use alcohol, tobacco, drugs, or other illegal substances.

Fisichella's Arrest and Conviction

6. Around December 17, 2005, when Fisichella's mother was recovering from a serious fall, she became unable to leave home to go to a pharmacy to have her prescription for Fentanyl[2] patches filled. Fisichella's mother gave Fisichella a $100 bill, a duly executed prescription for the Fentanyl patches, and her insurance information card. The prescription was issued by Dr. Bradley Chesler (Dr. Chesler), an Escondido physician specializing in physical medicine and rehabilitation. Fisichella told his mother he would have the prescription filled at the pharmacy where he next worked.

On December 19, 2005, Fisichella was assigned to serve as a temporary pharmacy technician at Sav-On Drug Store located at 734 South Rancho Santa Fe Road, Vista. During the course of his employment, Fisichella took a box containing four Fentanyl patches and put it in the pocket of the smock he was wearing. Later that day, he received a telephone call from his mother, who notified Fisichella that his father had just been admitted to Pomerado Hospital. Fisichella asked his supervisor if he could leave work due to a family emergency. The supervisor gave Fisichella permission, and Fisichella left the Sav-On outlet with the box of Fentanyl patches in his pocket. Fisichella did not have the prescription processed and he did not pay for the patches. Fisichella's activities were captured on a security video camera, but the videotape was not introduced.

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[2] Notice is taken that Fentanyl is a dangerous drug under Business and Professions Code section 4011 and a Schedule II controlled substance under Health and Safety Code section 11055. Fentanyl is an opioid analgesic whose potency is approximately eighty times that of morphine. Fentanyl was first synthesized in the late 1950s and introduced into medical practice in the 1960s as an intravenous anesthetic. Fentanyl is extensively used for anesthesia and analgesia, most often in operating rooms and intensive care units. Fentanyl transdermal patches (known as Duragesic) are most often used in the treatment of chronic pain.

A day or so later, Fisichella's mother asked Fisichella if he had filled her prescription. Fisichella told his mother he took a box of patches without paying for them. Fisichella's mother became very upset and told Fisichella to telephone the Sav-On outlet where he had been working immediately and notify them of the theft.

Fisichella telephoned Sav-On and "spilled my guts." The person Fisichella spoke to told him that the matter would be reported to Sav-On's loss prevention division. Fisichella did not document this telephone conversation. About five days later, Fisichella was assigned to work at a Sav-On outlet in Valley Center. After he reported to work, a female loss prevention investigator interviewed Fisichella. Once again, Fisichella admitted that he took a box of Fentanyl patches without processing his mother's prescription and without paying for the patches. Fisichella said he would return the patches to Sav-On, but he was told that he had to turn them in to a law enforcement agency. Several days later, Fisichella met with John Woo (Woo), a deputy sheriff assigned to the San Diego Pharmaceutical Narcotic Enforcement Team, and turned the box of patches in to Woo. Fisichella told Woo about his mother's illness, her request to Fisichella to fill the prescription, and his theft of the box of patches. Woo told Fisichella the matter would be turned over to the district attorney.

On August 6, 2006, a criminal complaint was filed in the Superior Court of California, County of San Diego, North County Division, entitled *The People of the State of California, Plaintiff, v. Nicholas Fisichella, Defendant*, bearing Case No. CN 215673.

On September 6, 2006, Fisichella pled guilty and was convicted on his guilty plea of violating Penal Code section 484 (theft) and of violating Health and Safety Code section 1377, subdivision (a) (unauthorized possession of a controlled substance). Each conviction was a misdemeanor under Penal Code section 17, subdivision (b)(4). In the change of plea form, Fisichella admitted he "unlawfully possessed a controlled substance and unlawfully took a controlled substance without paying for it." Fisichella was represented by a public defender in the criminal proceeding.

Criminal Sentencing

7. For the theft conviction, imposition of sentence was suspended and Fisichella was placed on three years summary probation, terms and conditions of which required him to pay fines and fees of approximately $1,300, to obey all laws, and to stay at least 100 yards away from the Sav-On outlet where the theft occurred.

For the drug possession conviction, entry of judgment was deferred for 18 months on condition that Fisichella totally abstain from the use of alcohol and illegal drugs, that he attend AA/NA meetings, that he submit to drug tests, that he remain law abiding, and that he attend and complete a Penal Code 1000 diversion program.

Fisichella successfully completed the drug diversion program; and, he complied with all other terms of the agreement involving the deferred entry of judgment. Any record of the plea related to the deferred entry of judgment was vacated in early April 2007.

Fisichella remains on summary probation for the theft conviction. He has paid all fines and fees associated with that conviction. He has complied with all other terms and conditions of probation, which expires on August 6, 2009, unless probation is terminated earlier under Penal Code section 1203.3 or other authority.

Evidence in Explanation, Extenuation, Mitigation and Rehabilitation

8. Fisichella's mother corroborated that she suffers from a physical condition causing her intractable pain; that she treats with Dr. Chesler; that Dr. Chesler prescribes Fentanyl patches for treatment of her pain on an ongoing basis and did so back in December 2005; that she gave her son a $100 bill, a prescription for the patches, and her insurance identification card and asked him to have the prescription filled because she could not travel to the pharmacy herself; that she called her son on December 19 and told him about his father's hospitalization; that her son told her a day or two afterwards that he stole a box of patches from work for her; and that she told him to call the store immediately and advise of the theft. Fisichella's mother testified that her son was and is very embarrassed about what has happened and that while he is not perfect, he is a good person who made a very bad mistake and is now having to live with that mistake. Fisichella is of great assistance and comfort to his parents and to his developmentally disabled sister who lives in Ramona.

9. Fisichella testified that as a result of his participation in the drug diversion program, he was given the opportunity to see firsthand what happened to others who became addicted to drugs and other illegal substances. The experience in the diversion program reinforced his belief that his use of alcohol and drugs was not something he wants to do.

10. After the theft, Fisichella applied for employment with MedImpact, a large company providing drug management services to a variety of clients, typically employer corporations, unions, managed care organizations, health plans, insurance carriers, and third-party administrators. Fisichella disclosed his convictions to MedImpact, who nevertheless hired Fisichella. Fisichella currently works in an administrative capacity which does not require him to have any involvement whatsoever with handling, packaging, dispensing, or any type of actual contact with any pharmaceutical products including controlled substances. Fisichella believed that he needs to maintain a valid pharmacy technician registration to keep his job, although he was not entirely certain of that. Fisichella enjoys his work and would very much like to continue his career with MedImpact.

11. Fisichella presented himself as a hardworking, contrite, and very embarrassed young man who truthfully provided a personal history and a criminal history that explained, but did not justify, his theft of a box of Fentanyl patches from his employer. Fisichella's criminal record and employment history was entirely inconsistent with that of a drug addict or substance abuser.

Disciplinary Guidelines

12. The Board enacted comprehensive regulatory guidelines[3] which should be followed in disciplinary actions, except that the Board recognizes that individual cases may necessitate a departure from these guidelines; in such cases, mitigating circumstances should be detailed.

With regard to a pharmacy technician, the guidelines state:

"The board files cases against pharmacy technicians where the violation(s) involve significant misconduct on the part of the licensee. The board believes that revocation is the appropriate penalty when grounds for discipline are found to exist. Grounds for discipline include, but are not limited to the following violation(s) of law(s) involving:

- Possession of dangerous drugs and/or controlled substances
- Use of dangerous drugs and/or controlled substances
- Possession for sale of dangerous drugs and/or controlled substances
- Personal misuse of drugs or alcohol . . . "

If a revocation is not imposed, the Board recommends a minimum of a Category III level of discipline be imposed. This would include a suspension and a period of probation. In addition, a pharmacy technician must obtain certification from the Pharmacy Technician Certification Board (PTCB) before resuming work as a pharmacy technician. The Board believes that certification before resuming work is always warranted in cases where a pharmacy technician registration is disciplined but not revoked.

In determining whether the minimum, maximum, or an intermediate penalty should be imposed in a given case, factors such as the following should be considered: (1) actual or potential harm to the public; (2) actual or potential harm to any consumer; (3) prior record, including level of compliance with any disciplinary orders; (4) prior warnings of record, including citations and fines; (5) number and/or variety of current violations; (6) nature and severity of the acts, offenses, or crimes under consideration; (7) mitigating evidence; (8) rehabilitation evidence; (9) compliance with terms of any criminal sentence; (10) overall criminal record; (11) if applicable, evidence of proceedings for case being set aside and dismissed pursuant to section 1203.4 of the Penal Code; (12) time passed since the acts or offenses; (13) whether the conduct was intentional or negligent, demonstrated incompetence, or, if the respondent is being held to account for conduct committed by another, the respondent had knowledge of or knowingly participated in such conduct; and (14) any financial benefit from the misconduct.

No single or combination of the above factors is required to justify the minimum and maximum penalty as opposed to an intermediate one.

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[3] California Code of Regulations, title 16, section 1760.

13. Fisichella's misconduct involved a Category III violation. The guidelines for a Category III violation provide:

> "A minimum three-year probation period has been established by the board as appropriate in most cases where probation is imposed. A minimum five-year probation period has been established by the board as appropriate where self-administration or diversion of controlled substances is involved. Terms and conditions are imposed to provide consumer protection and to allow the probationer to demonstrate rehabilitation . . . The board prefers that any stayed order be for revocation rather than for some period of suspension."

The Appropriate Measure of Discipline

14. Fisichella stole a box of Fentanyl patches from his employer when he was working as a registered pharmacy assistant. He did so to benefit his mother, not because he had a drug problem or a desire to use the Fentanyl patches himself. Fisichella advised his mother of the theft and, following her recommendation, he told his employer of the theft a couple of days later. Fisichella told the truth concerning his misconduct to staff at the Sav-On outlet where the theft took place, to the Sav-On loss prevention investigator, to the San Diego Pharmaceutical Narcotic Enforcement Team deputy, to the court, and to the Board. Fisichella's theft was an isolated, aberrant instance of misconduct. There was a potential of harm to the public, a potential of harm to the Sav-On outlet for the missing patches, but no harm to any consumer. Fisichella had not been registered as a pharmacist technician for an extended period of time, and he had no prior record of any discipline. The record contained evidence in mitigation and evidence in rehabilitation. Fisichella is learning a very difficult lesson. He complied with the drug diversion agreement he entered into and he has complied with all terms and condition of his criminal probation. Just over two years has passed since the misconduct, and Fisichella's contrition and remorse makes it strongly appear that similar misconduct will never reoccur. Fisichella does not have a substance abuse problem and it is unlikely that he will develop such a problem.

Fisichella was genuinely remorseful. He has consistently acknowledged that what he did was inexcusable. Fisichella recognized the pain and irreparable damage his misconduct has caused to himself and, more importantly, to his family. Fisichella is well aware of the Board's concerns and will accept whatever sanction is imposed.

The primary purpose of this disciplinary proceeding is to protect the public. The imposition of a revocation, stayed, with five years probation on appropriate terms and conditions of probation will adequately protect the public. Imposition of that sanction will permit Fisichella to further demonstrate his trustworthiness and the absence of a substance abuse problem. During the period he is on probation, Fisichella will be permitted to maintain his employment with MedImpact, he will be required to have his supervisor at MedImpact advise the Board in a letter signed under penalty of perjury that he continues his employment and does not have any actual contact with pharmaceutical products, he will be prohibited from working for any other employer as a pharmacy technician without first obtaining Board approval, he will be required to obtain certification from the PTCB before resuming any

work as a registered pharmacy technician that might involve his direct contact with pharmaceutical products, and he will be required to pay the Board's reasonable costs of investigation and prosecution.

Costs of Investigation and Enforcement

15. A certification of costs/declaration was signed by the deputy attorney general who prosecuted the action. The certification established that the Attorney General's Office billed 17.75 hours of attorney services at the rate of $158 per hour in the 2006-2007 and 2007-2008 fiscal years. The deputy attorney general who prosecuted the matter submitted a good faith estimate that he would spend an additional ten hours in the prosecution of the matter that had not yet been billed. The time spent, the time estimated, and the hourly rate were quite reasonable. The deputy attorney general who prosecuted the matter was well prepared and very professional. The Board's total reasonable costs of investigation and prosecution in this matter totaled $4,385.

Complainant sought a revocation, which was not unreasonable initially given the nature and extent of the wrongdoing. Fisichella always admitted wrongdoing, and he requested a hearing because he wanted to retain his registration to protect his employment with MedImpact. Fisichella requested this administrative proceeding to adjudicate the proper measure of discipline, he had a subjective good faith belief in the merits of his claim, and he raised a successful challenge to the proposed discipline.

Under the circumstances, cause exists to direct Fisichella to pay $2,500 in costs.

LEGAL CONCLUSIONS

Standard of Proof

1. Courts have drawn a clear distinction between professional licenses, such as veterinarians or psychologists, and nonprofessional occupational licenses. A nonprofessional license typically is issued without the need to demonstrate any specific education or skill and upon the mere showing of good character. In contrast, an applicant for a professional license must ordinarily satisfy extensive educational and training requirements, and then pass a rigorous state-administered competency examination. The sharp distinction between professional licenses and nonprofessional licenses supports a distinction in the standards of proof needed to revoke these two different types of licenses. Because a professional license represents the licensee's fulfillment of extensive education, training and testing requirements, it makes sense to require a higher standard of proof to suspend or revoke such a license. (*Mann v. Department of Motor Vehicles* (1999) 76 Cal.App.4th 312, 319.)

2. A vehicle salesperson's license carries no educational, training or testing prerequisites; all of the application criteria concern historical evidence of the applicant's character, honesty, integrity, and reputation, and the submission of other information regarding prior court judgments and disciplinary actions. Because no law requires that a

standard of proof other than preponderance of the evidence be applied, Evidence Code section 115 governs the standard of proof and requires proof by a preponderance of the evidence. (*Mann v. Department of Motor Vehicles* (1999) 76 Cal.App.4th 312, 319.)

The same standard of proof applies in the case of the revocation of a food processor's license because the requirements for obtaining a food processor's license do not require the applicant to satisfy burdensome requirements, but merely require the applicant to show good character and a sound financial position. (*San Benito Foods v. Veneman* (1996) 50 Cal.App.4th 1889, 1894-1895.)

3. An administrative disciplinary action seeking to suspend or revoke a professional license requires proof by "clear and convincing evidence." (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.)

This higher standard of proof applies to such professionals as physicians and surgeons (*Ettinger, supra*), dentists (*James v. Board of Dental Examiners* (1985) 172 Cal.App.3d 1096, 1 105), attorneys (*Furman v. State Bar* (1938) 12 Cal.2d 212, 229), real estate licensees (*Small v. Smith* (1971) 16 Cal.App.3d 450, 457), teachers (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1039-1040), and others.

4. The practice of pharmacy, like the practice of medicine, is a profession. (*Vermont & 110th Medical Arts Pharmacy v. Board of Pharmacy* (1981) 125 Cal.App.3d 19, 25.)

5. The suspension or revocation of a license issued to a registered pharmacist requires proof by clear and convincing evidence because of the extensive professional training that is required; however, it is not as evident that this elevated standard of proof applies to the suspension or revocation of a pharmacy technician's registration.

Registration as a Pharmacy Technician

6. Business and Professions Code section 4038 defines a "pharmacy technician" as "an individual who assists a pharmacist in a pharmacy in the performance of his or her pharmacy related duties as specified in section 4115." Business and Professions Code section 4115 sets forth various tasks a pharmacy technician may perform. For example, subdivision (a) provides "a pharmacy technician may perform packaging, manipulative, repetitive, or other nondiscretionary tasks, only while assisting, and while under the direct supervision and control of, a pharmacist." The duties a pharmacy technician may perform are further subject to regulation.[4]

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[4] California Code of Regulations, title 16, section 1793.2 provides:

"'Nondiscretionary tasks' as used in Business and Professions Code section 4115, include:

(a) Removing the drug or drugs from stock;
(b) counting, pouring, or mixing pharmaceuticals;
(c) placing the product into a container;

7. Business and Professions Code section 4115, subdivision (e) provides:

"No person shall act as a pharmacy technician without first being registered with the board as a pharmacy technician as set forth in Section 4202."

8. The rules and regulations related to registered pharmacy technicians do not allow a pharmacy technician to perform any discretionary act or any act requiring the exercise of professional judgment by a registered pharmacist. (*Californians for Safe Prescriptions v. California State Board of Pharmacy* (1993) 19 Cal.App.4th 1136, 1155-1156.)

9. Obtaining registration as a pharmacy technician requires more education and training than is required to obtain a license to sell cars or a permit to become a food processor; but, obtaining such a registration takes considerably less education, training, and experience than is required to become a doctor, dentist, attorney, teacher, or pharmacist. Passing a state-administered competency examination is not required to obtain registration, as is the case in order to become a real estate licensee or a licensed contractor.

It is concluded that the standard of proof required to suspend or revoke the registration issued to a pharmacy technician is a preponderance of the evidence. In this matter, the outcome would not be any different if the more stringent clear and convincing standard of proof were applied because there was no real dispute about any of the evidence.

Disciplinary Authority

10. Business and Professions Code section 490 provides:

"A board may suspend or revoke a license on the ground that the licensee has been convicted of a crime, if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued. A conviction within the meaning of this section means a plea or verdict of guilty or a conviction following a plea of nolo contendere. Any action which a board is permitted to take following the establishment of a conviction may be taken when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal, or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code."

11. Business and Professions Code section 4060 provides in part:

"No person shall possess any controlled substance, except that furnished to a person upon the prescription of a physician, dentist, podiatrist, optometrist, veterinarian, or

---

(d) affixing the label or labels to the container;
(e) packaging and repackaging."

naturopathic doctor . . . or furnished pursuant to a drug order issued by a certified nurse-midwife . . . , a nurse practitioner . . . , a physician assistant . . . , a naturopathic doctor . . . , or a pharmacist . . . This section shall not apply to the possession of any controlled substance by a manufacturer, wholesaler, pharmacy, pharmacist, physician, podiatrist, dentist, optometrist, veterinarian, naturopathic doctor, certified nurse-midwife, nurse practitioner, or physician assistant, when in stock in containers correctly labeled with the name and address of the supplier or producer.

Nothing in this section authorizes a certified nurse-midwife, a nurse practitioner, a physician assistant, or a naturopathic doctor, to order his or her own stock of dangerous drugs and devices."

12. Business and Professions Code section 4300 provides in part:

"(a) Every license issued may be suspended or revoked.

. . .

(e) The proceedings under this article shall be conducted in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of the Government Code, and the board shall have all the powers granted therein. The action shall be final, except that the propriety of the action is subject to review by the superior court pursuant to Section 1094.5 of the Code of Civil Procedure."

13. Business and Professions Code section 4202 provides in part:

"(d) The board may suspend or revoke a [pharmacy technician] registration issued pursuant to this section on any ground specified in Section 4301."

14. Business and Professions Code section 4301 provides in part:

"The board shall take action against any holder of a license who is guilty of unprofessional conduct . . . Unprofessional conduct shall include, but is not limited to, any of the following:

. . .

(f) The commission of any act involving moral turpitude, dishonesty, fraud, deceit, or corruption, whether the act is committed in the course of relations as a licensee or otherwise, and whether the act is a felony or misdemeanor or not.

. . .

(j) The violation of any of the statutes of this state, of any other state, or of the United States regulating controlled substances and dangerous drugs . . ."

Moral Turpitude

15. The simple possession of a controlled substance, as opposed to possession of a controlled substance for sale, does not necessarily involve moral turpitude. (*Clerici v. Department of Motor Vehicles* (1990) 224 Cal.App.3d 1016, 1023.)

16. Theft and moral turpitude are practically synonymous. In cases involving theft, no difficulty attends the determination of the question of moral turpitude based on consideration of the record of conviction alone. (*People v. Hunt* (1985) 169 Cal.App.3d 668, 675.)

17. The factual circumstances surrounding Fisichella's theft and subsequent possession of the Fentanyl patches established his commission of an act involving moral turpitude. This conclusion is based on Factual Findings 6 and on Legal Conclusions 14 and 16.

Substantial Relationship

18. A professional license may be suspended or revoked only if the conduct upon which the discipline is based relates to the practice of the particular profession and thereby demonstrates a present unfitness to practice such profession. Whether this requirement is termed a "nexus" or a "relationship," the inherent meaning is the same. There must be a logical connection between the licensees' conduct to their present fitness or competence to practice the profession or to the qualifications, functions, or duties of the profession in question. Despite the omission of an explicit requirement that there be a "substantial relationship" in a disciplinary statute, courts have concluded that the Legislature intend such a requirement. (*Clare v. California State Board of Accountancy* (1992) 10 Cal.App.4th 294, 301-303.)

19. The substantial relationship between holding a pharmacy technician registration and the theft or unlawful possession or use of controlled substances or dangerous drugs is obvious – persons who illegally possess or use such substances should not be permitted to hold employment that provides them with virtually unlimited access to controlled substances because of the high risk of diversion and abuse, and the harm that will inevitably be caused to the public as a consequence thereof. This relationship is amply demonstrated in the Board's guidelines.

Cause Exists to Impose Administrative Discipline

20. Cause exists to impose discipline against Fisichella's registration. On December 19, 2005, Fisichella stole a box containing four Fentanyl patches from a Sav-On outlet in Vista, which involved his theft of a controlled substance and possession of a controlled substance by theft. On September 6, 2006, Fisichella was thereafter convicted of theft, a crime involving moral turpitude. Fisichella's misconduct and conviction evidenced unprofessional conduct. The allegations set forth in the accusation were established by a preponderance of the evidence.

This conclusion is based on Factual Findings 3, 6, and 7, and on Legal Conclusions 1-19.

The Appropriate Measure of Discipline

21. The Board's disciplinary guidelines were applied in this matter. Those guidelines do not mandate a straight revocation given the kinds of evidence Fisichella presented in explanation, mitigation, and rehabilitation, but they do require the imposition of a Category III sanction. Fisichella's misconduct was very serious, but he appeared to have learned a very difficult lesson. There is no evidence that Fisichella suffers from a substance abuse problem, and there is no evidence that his current employment requires him to have any direct contact with controlled substances, even though such employment may require him to possess a registration. The imposition of a revocation, stayed, with five years probation on appropriate terms and conditions of probation will adequately protect the public.

This conclusion is based on Factual Findings 1-14 and on Legal Conclusions 9-20.

Recovery of Costs of Investigation and Prosecution

22. Business and Professions Code section 125.3 provides in part:

> "(a) Except as otherwise provided by law, in any order issued in resolution of a disciplinary proceeding . . . the board may request the administrative law judge to direct a licentiate found to have committed a violation . . . of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case . . .
>
> . . .
>
> (d) The administrative law judge shall make a proposed finding of the amount of reasonable costs of investigation and prosecution of the case when requested pursuant to subdivision (a) . . ."

23. In *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court held that the imposition of costs for investigation and enforcement under California Code of Regulations, title 16, section 317.5 did not violate due process. However, the court held that it was incumbent upon the Board to exercise its discretion to reduce or eliminate cost awards in such a manner as to ensure that the claims recovery regulation did not "deter chiropractors with potentially meritorious claims or defenses from exercising their right to a hearing." The Court set forth four factors which were required to be considered in deciding whether to reduce or eliminate costs: (1) whether the chiropractor used the hearing process to obtain dismissal of other charges or a reduction in the severity of the discipline imposed; (2) whether the chiropractor had a "subjective" good faith belief in the merits of his position; (3) whether the chiropractor raised a "colorable

challenge" to the proposed discipline; and (4) whether the chiropractor had the financial ability to make payments.

Since California Code of Regulation, title 16, section 317.5 and Business and Professions Code section 125.3 contain substantially the same language and seek the same kind of recovery, it is reasonable to extend the reasoning in *Zuckerman* to Business and Professions Code section 125.3.

24. Under all the circumstances, causes exists to direct Fisichella to pay to the Board $2,500 in costs.

This conclusion is based on all Factual Findings and 24-26 and on all Legal Conclusions.

ORDER

Pharmacy technician registration number TCH 64354 issued to respondent Nicholas Edward Fisichella is revoked; however, the order of revocation is stayed and respondent is placed on probation for five (5) years upon the following terms and conditions:

1. *Obey All Laws*

Respondent shall obey all state and federal laws and regulations substantially related to or governing the practice of pharmacy.

2. *Certification Prior to Resuming Work*

Respondent shall be suspended from working as a pharmacy technician until he is certified by the Pharmacy Technician Certification Board (PTCB) and provides satisfactory proof of certification to the Board. During this period of suspension, respondent shall not enter any pharmacy area or any portion of the licensed premises of a wholesaler, veterinary food-animal drug retailer or any other distributor of drugs which is licensed by the Board, or any manufacturer, or where dangerous drugs and devices or controlled substances are maintained. Respondent shall not do any act involving drug selection, selection of stock, manufacturing, compounding or dispensing; nor shall respondent manage, administer, or be a consultant to any licensee of the Board, or have access to or control the ordering, manufacturing or dispensing of dangerous drugs and devices or controlled substances.

Subject to the above restrictions, respondent may continue his employment with MedImpact so long as he does not have any direct contact with any controlled substance.

3. *Reporting to the Board*

Respondent shall report to the Board quarterly. The report shall be made either in person or in writing, as directed. Respondent shall state under penalty of perjury whether

there has been compliance with all the terms and conditions of probation. If the final probation report is not made as directed, probation shall be extended automatically until such time as the final report is made and accepted by the Board.

4. *Interview with the Board*

Upon receipt of reasonable notice, respondent shall appear in person for interviews with the Board upon request at various intervals at a location to be determined by the Board. Failure to appear for a scheduled interview without prior notification to Board staff shall be considered a violation of probation.

5. *Cooperation with Board Staff*

Respondent shall cooperate with the Board's inspectional program and in the Board's monitoring and investigation of respondent's compliance with the terms and conditions of his or her probation. Failure to comply shall be considered a violation of probation.

6. *Notice to Employers*

Respondent shall notify all present and prospective employers of the decision in this case (Case No. number 3054) and the terms, conditions and restrictions imposed on respondent by the decision. Within 30 days of the effective date of this decision, and before respondent undertakes any new employment, respondent shall cause his employer to report to the Board in writing acknowledging the employer has read the decision in Case No. 3054.

7. *Limitation on Employment*

Respondent shall not commence new employment in any pharmacy or any portion of the licensed premises of a wholesaler, veterinary food-animal drug retailer, or any other distributor of drugs that is licensed by the Board, or in any structure where dangerous drugs and devices or controlled substances are maintained, nor shall respondent have any new employment involving drug selection, selection of stock, manufacturing, compounding or dispensing, nor shall respondent manage, administer, or be a consultant to any licensee of the Board, nor shall respondent have access to or control the ordering, manufacturing or dispensing of dangerous drugs and devices or controlled substances without first seeking Board approval.

"Employment" within the meaning of this provision and provision six shall include any full-time, part-time, temporary or relief service or pharmacy management service as a pharmacy technician, whether the respondent is considered an employee or independent contractor.

8. *Reimbursement of Board Costs*

Respondent shall pay to the Board its costs of investigation and prosecution in the amount of $2,500.00. Respondent shall make said payments at the rate of $250 or more each month until this obligation is satisfied.

If respondent fails to pay the costs as specified by the Board, the Board shall, without affording the respondent notice and the opportunity to be heard, revoke probation and carry out the disciplinary order that was stayed. The filing of bankruptcy by respondent shall not relieve respondent of his or her responsibility to reimburse the Board its costs.

9. *Probation Monitoring Costs*

Respondent shall pay the costs associated with probation monitoring as determined by the Board each and every year of probation. Such costs shall be payable to the Board at the end of each year of probation. Failure to pay such costs shall be considered a violation of probation.

10. *Status of License*

Respondent shall, at all times while on probation, maintain an active current technician registration/certification with the Board, including any period during which suspension or probation is tolled. If respondent's technician registration/certification expires or is cancelled by operation of law or otherwise, upon renewal or reapplication, respondent's license shall be subject to all terms and conditions of this probation not previously satisfied.

11. *Notification of Employment/Mailing Address Change*

Respondent shall notify the Board in writing within 10 days of any change of employment. Said notification shall include the reasons for leaving and/or the address of the new employer, supervisor or owner and work schedule, if known. Respondent shall notify the Board in writing within 10 days of a change in name, mailing address or phone number.

12. *Random Drug Screening*

Respondent, at his or her own expense, shall participate in random testing, including but not limited to biological fluid testing (urine, blood), breathalyzer, hair follicle testing, or a drug screening program approved by the Board. The length of time shall be for the entire probation period and the frequency of testing will be determined by the Board. At all times respondent shall fully cooperate with the Board, and shall, when directed, submit to such tests and samples for the detection of alcohol, narcotics, hypnotics, dangerous drugs or other controlled substances. Failure to submit to testing as directed shall constitute a violation of probation. Any confirmed positive drug test shall result in the immediate suspension of practice by respondent. Respondent may not resume the practice of pharmacy until notified by the Board in writing.

13. *Work Site Monitor*

Within 10 days after commencing any new employment requiring a pharmacy technician registration, respondent shall identify a work site monitor, for prior approval by the Board, who shall be responsible for supervising respondent during working hours. The work site monitor shall report to the Board quarterly. Should the designated work site monitor determine at any time during the probationary period that respondent has not maintained sobriety, he or she shall notify the Board immediately, either orally or in writing as directed. Should respondent change employment, a new work site monitor must be designated, for prior approval by the Board, within 10 days of commencing new employment.

14. *Notification of Departure*

If respondent leaves the geographic area for a period greater than 24 hours, respondent shall notify the Board verbally and in writing of the dates of departure and return, prior to leaving.

15. *Abstain from Drugs and Alcohol Use*

Respondent shall completely abstain from the possession or use of controlled substances, dangerous drugs and their associated paraphernalia except when the drugs are lawfully prescribed by a licensed practitioner as part of a documented medical treatment. Upon request of the Board, respondent shall provide documentation from the licensed practitioner that the prescription was legitimately issued and is a necessary part of the treatment of the respondent. Respondent shall ensure that he is not in the presence of or in the same physical location as individuals who are using illicit substances even if respondent is not personally ingesting the drugs. Additionally, respondent shall cause the prescribing practitioner to notify the Board in writing, indicating their awareness of the chemical dependency. Additionally, respondent shall cause the prescribing physician to notify the Board in writing, indicating their awareness of the chemical dependency.

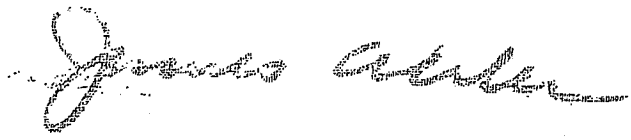
16. *Tolling of Suspension*

If respondent leaves California to reside or practice outside this state, or for any period exceeding 10 days (including vacation), respondent must notify the Board in writing of the dates of departure and return. Periods of residency or practice outside the state or any absence exceeding a period of 10 days shall not apply to the reduction of the suspension period. Respondent shall not act as a pharmacy technician upon returning to this state until notified by the Board that the period of suspension has been completed.

17. *Successful Completion of Probation*

Upon the successful completion or early termination of probation, respondent's registration shall be fully restored.

DATED: February 19, 2008



JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings

EDMUND G. BROWN JR., Attorney General
of the State of California
MARGARET A. LAFKO
Supervising Deputy Attorney General
DIANE DE KERVOR, State Bar No. 174721
Deputy Attorney General
California Department of Justice
110 West "A" Street, Suite 1100
San Diego, CA 92101

P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2611
Facsimile: (619) 645-2061

Attorneys for Complainant

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BEFORE THE
BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: **NICHOLAS EDWARD FISICHELLA** 23824 Green Haven Lane Ramona, CA 92065 Pharmacy Technician Registration No. TCH 64354 Respondent.	Case No. 3054 OAH No. **ACCUSATION**

Complainant alleges:

PARTIES

1. Virginia Herold (Complainant) brings this Accusation solely in her official capacity as the Executive Officer of the Board of Pharmacy, Department of Consumer Affairs.

2. On or about August 10, 2005, the Board of Pharmacy issued Pharmacy Technician Registration Number TCH 64354 to Nicholas Edward Fisichella (Respondent). The Pharmacy Technician Registration was in full force and effect at all times relevant to the charges brought herein and will expire on February 28, 2009, unless renewed.

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JURISDICTION AND STATUTORY PROVISIONS

3. This Accusation is brought before the Board of Pharmacy, under the authority of the following laws. All section references are to the Business and Professions Code unless otherwise indicated.

4. Code section 118, subdivision (b), states, in pertinent part, that the expiration of a license shall not deprive the Board of jurisdiction to proceed with a disciplinary action during the period within which the license may be renewed, restored, reissued or reinstated.

5. Code section 482 states:

"Each board under the provisions of this code shall develop criteria to evaluate the rehabilitation of a person when:

". . . .

"(b) Considering suspension or revocation of a license under Section 490.

"Each board shall take into account all competent evidence of rehabilitation furnished by the applicant or licensee."

6. Section 490 of the Code states, in pertinent part:

"A board may suspend or revoke a license on the ground that the licensee has been convicted of a crime, if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued. A conviction within the meaning of this section means a plea or verdict of guilty or a conviction following a plea of nolo contendere. . . . "

7. Code section 493 states:

"Notwithstanding any other provision of law, in a proceeding conducted by a board within the department pursuant to law to deny an application for a license or to suspend or revoke a license or otherwise take disciplinary action against a person who holds a license, upon the ground that the applicant or the licensee has been convicted of a crime substantially related to the qualifications, functions, and duties of the licensee in question, the record of conviction of the crime shall be conclusive evidence of the fact that the conviction occurred, but only of that fact,

and the board may inquire into the circumstances surrounding the commission of the crime in order to fix the degree of discipline or to determine if the conviction is substantially related to the qualifications, functions, and duties of the licensee in question.

"As used in this section, 'license' includes 'certificate,' 'permit,' 'authority,' and 'registration.'"

8. Section 4022 of the Code states:

"Dangerous drug" or "dangerous device" means any drug or device unsafe for self-use, except veterinary drugs that are labeled as such, and includes the following:

"(a) Any drug that bears the legend: "Caution: federal law prohibits dispensing without prescription," "Rx only," or words of similar import.

"(b) Any device that bears the statement: "Caution: federal law restricts this device to sale by or on the order of a _____," "Rx only," or words of similar import, the blank to be filled in with the designation of the practitioner licensed to use or order use of the device.

"(c) Any other drug or device that by federal or state law can be lawfully dispensed only on prescription or furnished pursuant to Section 4006."

9. Section 4060 of the Code states:

"No person shall possess any controlled substance, except that furnished to a person upon the prescription of a physician, dentist, podiatrist, or veterinarian, or furnished pursuant to a drug order issued by a certified nurse-midwife pursuant to Section 2746.51, a nurse practitioner pursuant to Section 2836.1, or a physician assistant pursuant to Section 3502.1. This section shall not apply to the possession of any controlled substance by a manufacturer, wholesaler, pharmacy, physician, podiatrist, dentist, veterinarian, certified nurse-midwife, nurse practitioner, or physician assistant, when in stock in containers correctly labeled with the name and address of the supplier or producer.

"Nothing in this section authorizes a certified nurse-midwife, a nurse practitioner, or a physician assistant to order his or her own stock of dangerous drugs and devices."

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10. Section 4300 of the Code states, in pertinent part:

"(a) Every license issued may be suspended or revoked."

11. Section 4301 of the Code states, in pertinent part:

"The board shall take action against any holder of a license who is guilty of unprofessional conduct or whose license has been procured by fraud or misrepresentation or issued by mistake. Unprofessional conduct shall include, but is not limited to, any of the following:

"(a) Gross immorality.

". . . .

"(f) The commission of any act involving moral turpitude, dishonesty, fraud, deceit, or corruption, whether the act is committed in the course of relations as a licensee or otherwise, and whether the act is a felony or misdemeanor or not.

". . . .

"(l) The conviction of a crime substantially related to the qualifications, functions, and duties of a licensee under this chapter. The record of conviction of a violation of Chapter 13 (commencing with Section 801) of Title 21 of the United States Code regulating controlled substances or of a violation of the statutes of this state regulating controlled substances or dangerous drugs shall be conclusive evidence of unprofessional conduct. In all other cases, the record of conviction shall be conclusive evidence only of the fact that the conviction occurred. The board may inquire into the circumstances surrounding the commission of the crime, in order to fix the degree of discipline or, in the case of a conviction not involving controlled substances or dangerous drugs, to determine if the conviction is of an offense substantially related to the qualifications, functions, and duties of a licensee under this chapter. A plea or verdict of guilty or a conviction following a plea of nolo contendere is deemed to be a conviction within the meaning of this provision. The board may take action when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under Section

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1203.4 of the Penal Code allowing the person to withdraw his or her plea of guilty and to enter a plea of not guilty, or setting aside the verdict of guilty, or dismissing the accusation, information, or indictment.

". . . .

"(o) Violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of or conspiring to violate any provision or term of this chapter or of the applicable federal and state laws and regulations governing pharmacy, including regulations established by the board."

12. Health and Safety Code section 11173 provides, in pertinent part:

"(a) No person shall obtain or attempt to obtain controlled substances, or procure or attempt to procure the administration of or prescription for controlled substances, (1) by fraud, deceit, misrepresentation, or subterfuge; or (2) by the concealment of a material fact."

13. California Code of Regulations, title 16, section 1769 states:

". . . .

"(b) When considering the suspension or revocation of a facility or a personal license on the ground that the licensee or the registrant has been convicted of a crime, the board, in evaluating the rehabilitation of such person and his present eligibility for a license will consider the following criteria:

"(1) Nature and severity of the act(s) or offense(s).

"(2) Total criminal record.

"(3) The time that has elapsed since commission of the act(s) or offense(s).

"(4) Whether the licensee has complied with all terms of parole, probation, restitution or any other sanctions lawfully imposed against the licensee.

"(5) Evidence, if any, of rehabilitation submitted by the licensee."

14. California Code of Regulations, title 16, section 1770 states:

"For the purpose of denial, suspension, or revocation of a personal or facility license pursuant to Division 1.5 (commencing with Section 475) of the Business and Professions Code, a crime or act shall be considered substantially related to the qualifications, functions or

duties of a licensee or registrant if to a substantial degree it evidences present or potential unfitness of a licensee or registrant to perform the functions authorized by his license or registration in a manner consistent with the public health, safety, or welfare."

COST RECOVERY

15. Section 125.3 of the Code states, in pertinent part, that the Board may request the administrative law judge to direct a licentiate found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.

DRUG

16. **Duragesic,** generic name **Fentanyl,** is a pain reliever. It is a dangerous drug pursuant to section 4022 and a Schedule II controlled substance pursuant to Health and Safety Code section 11055.

FIRST CAUSE FOR DISCIPLINE

(September 6, 2006 Criminal Conviction - Theft of a Controlled Substance on December 19, 2005)

17. Grounds exist to revoke Respondent's license under sections 490, 493, and 4301(f), (l), and (o) for a criminal conviction that is substantially related to the qualifications, functions, and duties of a Pharmacy Technician.

18. On or about December 30, 2005, Sav On Drug Store 9166, located at 734 South Rancho Santa Fe Road in San Diego, reported the employee theft of 5 **Fentanyl** patches on a DEA 106 form (Report of Theft of Loss of Controlled Substances).

19. Respondent, a temporary employee, worked on the afternoon of December 19, 2005 as a Pharmacy Technician. On that day, a video camera caught him taking one box of Fentanyl patches and placing it in his pocket. Respondent then went to the bathroom. Respondent then received a phone call and asked to go home because of a family emergency. The loss was discovered later that day.

20. In an interview on January 4, 2006, Respondent admitted to the store's Loss Prevention Investigator that he had taken the Fentanyl patches to give to his mother who

was ill and used the drug. He said that there were four patches in the box and that there were still four patches in his possession because he never gave any to his mother. Respondent was given a written statement of the theft valued at $198.65. The Sherif's Department was notified, Respondent admitted to the theft and turned over four of the Fentanyl patches; he was charged by the San Diego Pharmaceutical Narcotic Enforcement Team. Respondent told the officer that his mother was ill and had been unable to drive to the pain doctor, so he impulsively took the patches to give to her. Respondent was subsequently terminated from his position at the store.

21. On August 4, 2006, a criminal complaint was filed in a case entitled *People vs. Nicholas Fisichella* (Sup. Ct., San Diego, 2006, Case No. CN215673) charging Respondent with violations of Penal Code section 508 (Fraudulent Appropriation by an Employee), a felony; Health and Safety Code section 11350(a) (Possession of a Controlled Substance), a felony; and Penal Code section 484 (Petty Theft), a misdemeanor, and Health and Safety Code section 11377(a) (Possession of a Controlled Substance), a misdemeanor.

22. In an August 23, 2006 statement to the Board, Respondent stated that he walked out of the store with an open box of Fentanyl patches and that he called the store immediately when he realized what he had done. Respondent was told by the store that Loss Prevention would contact him. When he did finally meet with Loss Prevention, they told him they were unaware of his call and that it would be better for him if he had a reason for taking the patches. Thus, he told them that his mother's prescription was due, that she had asked him to pick up the patches, and that he took them for her. He stated that "it was not with evil intent or for personal use" and that he "called as soon as he realized" the drugs were in his coat. He stated that he subsequently resigned from the store. Respondent stated that he was "sorry and embarrassed, ashamed, and sick at heart. I hurt my family."

23. On or about September 6, 2006 in the Superior Court for the County of San Diego, in a case entitled *People vs. Nicholas Fisichella* (Sup. Ct., San Diego, 2006, Case No. CN215673), respondent admitted that he unlawfully possessed a controlled substance and unlawfully took such controlled substance without paying for it. He then pled guilty to a violation of Penal Code section 484 (Theft) and a violation of Health and Safety Code section

11377(a) (Unauthorized Possession of a Controlled Substance) per Penal Code 17(b)(4), both misdemeanors. The felony counts, one and two, were dismissed.

24. Pursuant to a plea agreement, on or about September 6, 2006, Respondent was sentenced to three years probation, he was fined $600.00, and he was ordered to stay 100 yards away from the drug store. Respondent's sentence on count four (Unauthorized Possession of a Controlled Substance) was suspended for 18 months pursuant to Penal Code section 1000 and he was fined $300.

SECOND CAUSE FOR DISCIPLINE

(Procurement and Possession of Controlled Substances By Fraud and Theft in Violation of Pharmacy and Drug Laws)

25. Respondent is subject to disciplinary action under section 4301(o), section 4060, and Health and Safety Code sections 11173(a) and 11377(a) in that he stole Fentanyl patches, a dangerous drug pursuant to Code section 4022(a), from the pharmacy where he worked as a Pharmacy Technician. The circumstances of this cause for discipline are set forth in paragraphs 18-24 above, and are incorporated by reference herein.

THIRD CAUSE FOR DISCIPLINE

(Unprofessional Conduct Involving Gross Immorality, Moral Turpitude, and Dishonesty and in Violation of Pharmacy and Drug Laws)

26. Respondent is subject to disciplinary action under section 4301(a), (f), and (o) in that he stole Fentanyl patches, a dangerous drug pursuant to Code section 4022(a), from the pharmacy where he worked as a Pharmacy Technician. The circumstances of this cause for discipline are set forth in paragraphs 18-24 above, and are incorporated by reference herein.

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PRAYER

WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged, and that following the hearing, the Board of Pharmacy issue a decision:

1. Revoking or suspending Pharmacy technician Registration Number TCH 64354, issued to Nicholas Fisichella.

2. Ordering Nicholas Fisichella to pay the Board of Pharmacy the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 125.3;

3. Taking such other and further action as deemed necessary and proper.

DATED: 5/4/07

VIRGINIA HEROLD
Executive Officer
Board of Pharmacy
Department of Consumer Affairs
State of California
Complainant

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